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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE AES CORPORATION,

Cross-Petitioner,

v.

THE DOW CHEMICAL COMPANY,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Cross-petitioner The AES Corporation ("AES") brings this suit under the Securities Exchange Act of 1934 (the "Exchange Act") against cross-respondent The Dow Chemical Company ("Dow") (petitioner in No. 03-272) for securities fraud in connection with a stock purchase transaction. The Third Circuit held that enforcement of certain merger and non-reliance clauses in the written agreements for the transaction to bar AES's fraud claims as a matter of law would be inconsistent with Section 29(a) of the Exchange Act, which provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with" the Act "shall be void." The Third Circuit, however, also held that the merger and non-reliance clauses could be considered by the district court on remand as evidence in determining the reasonableness of any reliance by AES. One of the three Circuit Judges dissented from the holding of the majority on the evidentiary use of the clauses on remand and its interpretation of the word "void." The dissenting Circuit Judge argued that a clause which is "void" as a waiver of compliance under Section 29(a) must be "void" for all purposes, including evidentiary ones, under the plain language of the statute.

The question presented by this conditional cross-petition is whether, if certiorari is granted in No. 03-272, the judgment of the Third Circuit should be modified to uphold the position of the dissent that the merger and non-reliance clauses may not be considered as evidence by the district court on remand in determining the reasonableness of any reliance by AES under the express terms of Section 29(a).

PARTIES TO THE PROCEEDINGS

Cross-petitioner is plaintiff The AES Corporation. Cross-respondent is defendant The Dow Chemical Company.

Dynegy Power Corporation, formerly known as Destec Energy Inc., also was a defendant in the district court, but it reached a settlement with The AES Corporation and therefore was not a party to the proceeding in the court of appeals and is not a party here.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Cross-petitioner The AES Corporation is a publicly held company. Cross-petitioner has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Statement Pursuant To Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement	3
Reasons for Granting the Conditional Cross-Petition	5
Conclusion	7

TABLE OF AUTHORITIES

Page

Statutes and Rules

15 U.S.C. § 78cc ..... *passim*

28 U.S.C. § 1254 2

Securities and Exchange Commission Rule 10b-5 ... 3

U.S. Supreme Court Rule 12.5 2

Other Authorities

Black's Law Dictionary (7th ed. 1999) 6

The American Heritage Dictionary (4th ed. 2001) ... 6

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The AES Corporation ("AES") respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *The Dow Chemical Company v. The AES Corporation*, No. 03-272. AES requests that its cross-petition be granted if the Court grants certiorari on the question presented in the petition for a writ of certiorari filed by The Dow Chemical Company ("Dow").

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)* is reported at 325 F.3d 174. The opinion of the district court (Pet. App. 19a-32a) is reported at 157 F. Supp. 2d 346.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2003. Dow filed timely petitions for rehearing and rehearing en banc on April 28, 2003. The court of appeals denied the petitions for rehearing and rehearing en banc on May 13, 2003. (Pet. App. 33a-34a.) On August 5, 2003, Justice Souter extended Dow's time to file a petition for a writ of certiorari to and including August 18, 2003. The petition for a writ of certiorari in *The Dow Chemical Company v. The AES Corporation*, No. 03-272, was filed on August 18, 2003, and placed on this Court's docket on August 20, 2003. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 29(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78cc(a), provides as follows:

> Any condition, stipulation, or provision binding any person to waive compliance with any

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* References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by Dow in *The Dow Chemical Company v. The AES Corporation*, No. 03-272.

provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

STATEMENT

The facts and proceedings below are set forth in the Brief in Opposition filed by AES in *The Dow Chemical Company v. The AES Corporation*, No. 03-272. Accordingly, AES will address herein only those aspects of the proceedings below that are pertinent to this conditional cross-petition.

The issue presented in No. 03-272 and in this conditional cross-petition concerns whether a court may give any weight to the existence of merger and non-reliance clauses in written agreements for a negotiated securities transaction in determining whether the reliance of a plaintiff bringing claims under the Exchange Act was reasonable.

AES brought this action against Dow and Dynegy Power Corporation (formerly Destec Energy, Inc.) ("Destec"), formerly a subsidiary of Dow, on November 30, 1998, for violations of Sections 10(b) and 20(a) of the Exchange Act and Securities and Exchange Commission Rule 10b-5 in connection with a transaction in which AES purchased 100% of the stock of an international subsidiary of Destec, Destec Engineering, Inc. ("DEI"), in 1997. Dow moved for summary judgment on March 2, 2001, before any discovery was taken by any party. In support of its motion, Dow relied solely on the written agreements among the parties for the stock purchase transaction. Dow argued that the existence of certain merger and non-reliance clauses in the agreements precluded AES, as a matter of law, from establishing its justifiable reliance on any representations not contained in the parties' final written agreements.

The district court granted Dow's motion for summary judgment on AES's federal securities law claims on August 2, 2001. The district court held that as a result of the merger and non-reliance clauses, AES's reliance on Dow's misrepresentations was unreasonable as a matter of law, foreclosing AES's ability to pursue any claim under the federal securities laws. The district court rejected AES's argument that the clauses cannot be given such force in light of Section 29(a) of the Exchange Act. The district court concluded that in the circumstances of this case, "Section 29(a) of the Exchange Act does not bar the enforcement of a clause disclaiming representations and warranties not appearing in a final agreement negotiated between sophisticated parties in an arm's length transaction." (Pet. App. 30a.)

The Third Circuit reversed the judgment of the district court. It held that "enforcement of the non-reliance clauses to bar AES's fraud claims as a matter of law would be inconsistent with Section 29(a)." (Pet. App. 9a.) The Third Circuit, however, found that a merger or non-reliance clause "alone or in conjunction with other evidence of non-reliance, may establish an absence of reliance and, when unrebutted, may even provide a basis for summary judgment in the defendant's favor." (*Id.* 11a.) The Third Circuit remanded the case to the district court to consider, in light of all of the relevant facts, the reasonableness of AES's reliance on Dow and Destec's alleged misrepresentation. In describing the issue for decision on remand, the Third Circuit explained that "[t]he non-reliance clauses are, of course, among the circumstances to be considered in determining the reasonableness of any reliance here." (*Id.* 12a.)

One of the three Circuit Judges filed an opinion concurring and dissenting in part from the opinion of the majority. Circuit Judge Wallace concurred with the reversal of the district court's judgment, but dissented from the majority's holding that the merger and non-reliance clauses could be used as evidence that AES's reliance on Dow's misstatements was unreasonable. (*Id.* 17a.) Circuit Judge Wallace found that the merger and non-reliance clauses at issue in the case "are waivers of compliance [with the Securities Exchange Act], and under the express terms of section 29, they are 'void.'" (*Id.*) Noting that "[t]he majority holds that the void stipulation can nonetheless be evidence of the reasonableness of AES's reliance," he wrote "separately because I cannot join in the majority's interpretation of the word 'void.'" (*Id.*) Citing the plain meaning of the word, Circuit Judge Wallace wrote that "[i]f we permit the void stipulation to have evidentiary value, it is no longer a nullity, ineffective, or useless." (*Id.* 17a-18a.) He concluded "[t]o permit the void stipulation to serve as evidence of a lack of reasonable reliance would be to take the teeth out of section 29." (*Id.* 18a.)

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

If this Court grants a writ of certiorari to review the effect of the statutory prohibition in Section 29(a) of the Exchange Act against waivers of compliance with the federal securities laws on merger and non-reliance clauses, it should review the closely intertwined question of what, if any, evidentiary weight may be given to such a non-reliance or merger clause.

The Third Circuit properly held that it would violate Section 29(a) to find that the non-reliance and merger clauses

alone establish, as a matter of law, that any reliance of AES was unreasonable reliance. The Third Circuit's holding that the existence of the merger and non-reliance clauses can be considered on remand by the district court as evidence in determining the reasonableness of any reliance by AES, however, conflicts with the plain meaning of Section 29(a).

As Circuit Judge Wallace pointed out in dissent, the holding of the majority of the Third Circuit ignores the plain meaning of the word "void" as it is used in Section 29(a). The majority held that the merger and non-reliance clauses at issue in this case are waivers of compliance within the meaning of Section 29(a). Under the express terms of the statute, the clauses, accordingly, "shall be void." By its plain meaning, "[a] void clause is 'of no effect whatsoever.' *Black's Law Dictionary* 1568 (7th ed. 1999). It is 'an absolute nullity.' *Id.* It is 'ineffective,' 'useless,' 'having no legal force or validity.' *The American Heritage Dictionary* 911 (4th ed. 2001)." (Pet. App. 17a.)

The majority of the Third Circuit, however, permitted the "void" clauses to have some "legal force or validity" in holding that they could be considered by the district court on remand as evidence of the reasonableness of AES's reliance. As Circuit Judge Wallace wrote, "[i]f we permit the void stipulation to have evidentiary value, it is no longer a nullity, ineffective, or useless. . . . This is precisely what section 29(a) prohibits." (*Id.* 17a-18a.)

In interpreting the statutory prohibition in Section 29(a) against waivers of compliance with the federal securities laws, this Court necessarily must consider the plain meaning of the word "void" as it is used in Section 29(a), and Congress's intent in its use of the word "void" in that statute.

This Court, therefore, should consider whether a merger or non-reliance clause can be "void" under the express terms of Section 29(a) and, yet, still considered by the district court on remand as evidence bearing on the issue of whether any reliance by the buyer was reasonable.

Because the Third Circuit's holding concerning the evidentiary use and weight of merger and non-reliance clauses contradicts the plain meaning and purpose of Section 29(a), it should be modified by this Court.

CONCLUSION

If the petition for a writ of certiorari in No. 03-272 is granted, this cross-petition should also be granted. If the Court denies the petition in No. 03-272, this cross-petition should be denied.

Dated: New York, New York
September 18, 2003

Respectfully submitted,

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